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IN THE
COURT OF APPEALS OF INDIANA

ANDRE DAVIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0710-CR-565
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Young, Judge
The Honorable Michael Jenson, Magistrate
Cause No. 49G20-0402-FA-018946

July 25, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Andre Davis appeals his conviction for Dealing in Cocaine,[1] a class A felony, claiming that the trial court erred in admitting certain evidence at trial that the police seized from a residence, his clothing, and a zippered bag that was in the trunk of a vehicle that was parked in front of a residence. Davis also contends that the trial court erred in denying his motion to sever the trial from that of his codefendants, that the jury was improperly instructed, that the evidence was insufficient to support his conviction, and that the forty-five-year sentence was inappropriate in light of the nature of the offense and his character. Concluding that the cocaine that the police officers seized from the bag was properly admitted into evidence and finding no other error, we affirm the judgment of the trial court.

FACTS

On February 6, 2004, the State filed a two-count information against Davis, Conway Jefferson, and Curtis Chapman, charging them with dealing in cocaine, a class A felony, and possession of cocaine, a class C felony.

Thereafter, on July 12, 2004, the State filed a complaint for forfeiture against Davis seeking judgment in the amount of $5811, which represented the amount of currency that police officers seized from him during the search of Jefferson's residence. More specifically, the facts, as reported in Davis's appeal regarding the forfeiture action, are as follows:

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[1] Ind. Code § 35-48-4-1.

On February 3, 2004, Officer Jeffrey McPherson, a narcotics investigator with the Metropolitan Drug Task Force (Task Force) of the Indianapolis Police Department (IPD), executed a search warrant at 741 North Bosart. Officer McPherson entered the residence and saw Davis and two other men sitting at a table in the dining room and playing cards. Officer McPherson detected the odor of burnt marijuana and "coke or cooking cocaine." Tr. p. 15-16. He entered the kitchen and discovered sixty-six grams of what appeared to be crack cocaine. The suspected cocaine was in a pot on the stove that was being cooled with ice cubes. Based upon his experience as a police officer and his involvement in thousands of drug investigations, Officer McPherson was confident that the substance was cocaine. All three men were arrested and charged with possession of cocaine and marijuana. When the men and the residence were searched, Officer McPherson found approximately $14,000 in the residence and additional cocaine on one of the other men.

When Davis was in custody awaiting transport to the jail, Sergeant Eric Ledoux of the Task Force removed some keys from Davis's pocket. Sergeant Ledoux also discovered $5811 in Davis's pockets. After issuing the Miranda warnings to Davis, Sergeant Ledoux inquired about the money. Davis responded that he received the money from selling a house. Although Davis told Sergeant Ledoux that he sold houses from time to time, Davis did not have a real estate license and could not remember which house he had sold. Sergeant Ledoux took the keys from Davis's pocket, went outside, and pressed the button on the key fob. As a result, the lights and alarm sounded on a vehicle from Budget Car Rental that was parked on the street. The vehicle also became unlocked at that point, and it was subsequently determined that the vehicle had been rented by Davis's girlfriend's mother.

Officer McPherson testified that the vehicle was impounded in accordance with IPD policy. That policy provides that when an individual in control of a vehicle that belongs to a third party is going to be transported to jail, the vehicle may be seized. During an inventory of the vehicle, a green bag that appeared to contain cocaine was discovered in the trunk. Officer McPherson testified that the green bag contained packages of a white powdery substance in clear plastic baggies, "which is the standard packaging material for somebody who's going to deal cocaine." Appellant's App. p. 44. He stated that the packages found in the vehicle were consistent with what, in his experience, was cocaine packaged for sale. The white powder weighed approximately 650 grams.

Davis v. State, No. 49A05-0604-CV-207, slip op. at 2-3 (Ind. Ct. App. Nov. 6, 2006), trans. denied.

Prior to trial in the forfeiture action, Davis filed a motion to suppress, claiming that all of the evidence seized—including the money and cocaine in the vehicle—was the product of an unlawful warrantless stop, search, and interrogation. The trial court denied Davis's motion, and following a bench trial on January 27, 2006, judgment was entered in favor of the State on the forfeiture complaint.

Davis appealed, and the trial court stayed the proceedings in the criminal matter pending the forfeiture appeal. In that appeal, Davis argued that the cocaine and money that were seized were improperly admitted into evidence because the conduct of the police was merely pretextual and the "'vehicle was legally parked on a public street, was properly registered, had no equipment violations, and was not obstructing traffic and no one requested that [the] vehicle be towed.'" Id. at 4 (quoting Appellant's Br. p. 5).

In our memorandum decision, we determined that "the police officers had probable cause to arrest Davis, and they properly conducted a search of his person incident to the arrest. Thus, Davis cannot complain that the money seized from his person was improperly admitted into evidence." Id. at 6. We also held that because Davis was under arrest before the police searched the vehicle, the vehicle was properly impounded. Id. at 7. And, with respect to the subsequent inventory search of the vehicle, the evidence showed that the Indianapolis Police Department has a specific policy regarding impoundments and inventory searches. Because the search of the vehicle that Davis was driving was incident to a lawful arrest and Davis could not take custody of his

property because the police were going to transport him to jail, we concluded that it was reasonable for the police to impound the vehicle and search it pursuant to the inventory exception to the warrant requirement. Finally, we concluded that the impoundment of the vehicle and inventory search were reasonable as an exception to the warrant requirement under Article I, Section 11 of the Indiana Constitution. Id. at 8-9.

When the criminal proceedings against Davis recommenced, the trial court issued an order on August 9, 2007, which provided that Davis was not precluded from raising the constitutionality of the search in this appeal. More specifically, the trial court's order provided:

> 5. Following an evidentiary hearing in the forfeiture action, judgment was entered for the State and the defendant appealed resulting in the issuance of a memorandum decision under appellate cause number 49A05-0604-CV-207 on March 6, 2006. The trial court's ruling for the State was upheld by the appellate court. And transfer was denied by the Indiana Supreme Court on March 22, 2007.
>
> 6. The defendant is seeking a suppression hearing in this court on the criminal case. The State is arguing that the doctrines of collateral estoppel, res judicata, and/or law of the case preclude the Court from reconsidering the issues of suppression.
>
> 7. The Court believes that the answer to this issue is based on the burden of proof that was applied by the Court in the civil forfeiture action. The Court is unable to determine what burden of proof was used. Nor can the Court predict what evidence will be presented at the trial of this case.
>
> Wherefore, this court finds that the defendant is NOT precluded from raising the constitutionality of the search in this case at the trial of this matter.

Appellant's App. p. 75-76.[2]

The trial court heard evidence on Davis's motion to suppress regarding the search and seizure of the items taken from the residence, his person, and the vehicle, on August 8, 2005, June 22, 2007, and July 13, 2007. Davis's motion was denied, and on September 4, 2007, Jefferson asked to proceed pro se and Davis moved to sever the proceedings. The trial court denied Davis's request, permitted Jefferson to proceed pro se, and determined that it was unlikely that a pro se defendant would cause a mistrial. Thus, a jury trial commenced on September 6, 2007, and all three defendants were tried jointly.

The evidence presented at trial demonstrated that in 2003, Officer McPherson received information from the Drug Enforcement Agency and from a confidential informant that Jefferson was selling drugs in Indianapolis. Thereafter, Officer McPherson determined that Jefferson and his girlfriend lived at 741 North Bosart.

Sometime on the morning of February 2, 2004, Officer McPherson went to the alley behind Jefferson's residence. It was the regular day for trash collection, and the trashcans behind all of the houses, including Jefferson's, had been placed out for collection. Standing in the alley, Officer McPherson reached into the trash can directly behind Jefferson's residence and retrieved envelopes addressed to Jefferson's live-in girlfriend, the burnt ends of marijuana cigarettes, and more than forty plastic sandwich

[2] The State does not challenge this ruling on appeal. Moreover, in the forfeiture proceedings, the State was only required to show by a preponderance of the evidence that the $5811 was connected to drug dealing. See Lipscomb v. State, 857 N.E.2d 424, 428 (Ind. Ct. App. 2006).

bags with the corner ends removed. Based on Officer McPherson's experience, he knew that drug dealers commonly use the corners of plastic sandwich bags to package marijuana for sale.

The next day, Officer McPherson obtained a warrant to search Jefferson's house for "marijuana, scales, packaging material, and other indicia of marijuana trafficking." Tr. p. 17, 19-21. Later that same day, Officer McPherson and several other police officers executed the search warrant.

When the officers entered Jefferson's house, they immediately smelled the odor of burning marijuana. Davis, Jefferson, and Chapman were sitting at a table in the dining area playing cards. A marijuana cigarette and a bag of marijuana were lying in an ashtray on the table. As Officer McPherson entered the kitchen, he identified an odor that is produced by cooking powdered cocaine into crack cocaine. The officers also saw a Pyrex beaker that had been placed into a bowl of ice water on the kitchen counter that contained a yellow-white substance. The police officers knew that manufacturers of crack cocaine typically use Pyrex containers, and they recognized the other items as those that are commonly used in manufacturing crack cocaine. The contents of the Pyrex beaker were later analyzed and found to be approximately sixty-six grams of cocaine. The police offices also found a digital scale box and sandwich bags in Jefferson's kitchen, two handguns, boxes of ammunition, and $4000 in cash that was located in a drawer near the bathroom.

Thereafter, all three men were handcuffed and searched. The police officers found ten baggies holding approximately five grams of powdered cocaine and twenty-four

grams of crack cocaine in Jefferson's pants pocket. When Davis was searched, the police officers found $5811 in cash, a cell phone, and a key fob that was attached to a key that bore the logo of Budget Rental Car.

After Davis was arrested, handcuffed and advised of the Miranda[3] warnings, he told the officers that he had recently sold several houses. However, as noted above, Davis was not a realtor and he could not remember where the houses were located. Officer LeDoux, who initially searched Davis, placed the key fob back in Davis's pocket. Officer Ledoux testified that Davis informed him that "someone" had dropped him off at the residence, the key was not his, and "he didn't know how it got in his pocket." Id. at 357. After informing Officer McPherson of Davis's statements regarding the alleged sales of the houses and the conversation about the key, Officer Ledoux again approached Davis, retrieved the key, and walked onto the front porch of the residence. When Officer Ledoux pushed the key fob's "panic button," the lights to a Ford Taurus that was legally parked near Jefferson's home began to blink and the vehicle emitted a siren-like sound. Id. at 359.

Thereafter, the police officers called for a narcotics sniffing dog. However, the dog did not alert to the presence of drugs when it sniffed around the vehicle. The police officers then opened the trunk of the vehicle with the key and found a green canvas bag inside. They opened the bag and discovered approximately 636 grams of cocaine that had been divided into a number of small plastic bags. The police also found a utility

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

knife and a digital "palm scale" in the trunk. Id. at 443, 449-50. A subsequent investigation revealed that the Taurus had been rented from the Budget Car Rental agency by Mrs. Eddie Scott. Scott had permitted her daughter to drive it, and it was determined that her daughter was Davis's girlfriend.

The crack cocaine that had been cooking in Jefferson's kitchen had a street value of approximately $6600 and the cocaine recovered from his pocket was valued at $2800, if sold by the gram. The cocaine that was seized from the trunk of the Taurus had a street value of approximately $63,000.

On September 6, 2007, a jury trial commenced against all three defendants. At some point during the trial, Jefferson attempted to elicit testimony about his girlfriend being the true owner of the guns and ammunition that were found during the search. However, the trial court excluded this purported evidence as hearsay. Jefferson then asked for confirmation that no fingerprints or DNA on the gun were his, which the trial court also excluded from the evidence.

During closing argument, Jefferson told the jury that there was no evidence that he ever intended to sell cocaine. He pointed out that there was no evidence that he ever sold drugs, and he explained that he was not a drug dealer. Moreover, Jefferson stated that he had "changed his life." Tr. p. 615. Jefferson then admitted that he possessed cocaine for personal use, and argued that the police had not seen any drug dealing during the surveillance of his residence. Finally, Jefferson explained that in spite of what the officers believed, the narcotics found were for personal use and not for sale.

Davis's counsel did not object, and following Jefferson's statements, the trial court admonished the jury on two occasions that Jefferson was presenting argument rather than evidence. The trial court also instructed the jury to disregard various aspects of Jefferson's testimony. Id. at 619.

Following the presentation of the evidence, Davis requested that the trial court give an instruction, which provided in part that "[t]he mere presence where cocaine is located or associations with persons who possess cocaine is not alone sufficient to support a finding of constructive possession." Appellant's App. p. 5. The trial court refused the instruction, observing that its own instruction was more complete and that Davis's tendered instruction was an incorrect statement of the law. Davis and Jefferson were found guilty of both possession of cocaine and dealing in cocaine. Chapman was acquitted of the dealing charge and found guilty of cocaine possession as a class C felony.

When Davis appeared for sentencing, the trial court noted that Davis had convictions in 1989 for misdemeanor possession of marijuana and in 1991 for driving while suspended. Davis had also been convicted of criminal trespass and resisting law enforcement in 1989 and had violated his probation on those offenses. Moreover, Davis had accumulated three other arrests for misdemeanors that were not reduced to convictions. Also, in 1993, Davis was convicted of dealing in cocaine as a class B felony and sentenced to twenty years in the Department of Correction (DOC). However, on March 24, 2000, Davis's sentence was modified, and he was released from the DOC and placed on work release. Finally, on September 23, 2003, Davis was charged in Kansas

with possession with intent to distribute.[4] Davis had been released on bond from the Kansas charge when he committed the instant offense. Thereafter, the trial court sentenced Davis to an executed term of forty-five years for dealing in cocaine,[5] and he now appeals.

DISCUSSION AND DECISION

I. Search and Seizure

Davis first contends that his conviction for dealing in cocaine must be reversed because the State violated his right to be free from unreasonable search and seizure under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution. More specifically, Davis maintains that the police "improperly searched . . . Jefferson's home, searched . . . Davis a second time, removed the key fob and then used the key fob to identify a parked car." Appellant's Br. p. 5. Davis also alleges that the police officers improperly searched the trunk of the parked vehicle and, therefore, the warrantless search of the zippered bag in the trunk was improper. As a result, Davis asserts that the trial court erred in admitting the evidence that the police officers seized during the searches.

In addressing Davis's challenge to the search of Jefferson's residence, we initially observe that under the Fourth Amendment to the United States Constitution, searches conducted without a warrant are presumed to be unconstitutional and the burden is on the

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[4] The pre-sentence investigation report does not reflect the drug that Davis allegedly possessed.

[5] The trial court did not enter a judgment of conviction on the possession charge because it determined that the same cocaine was alleged to support both counts. Tr. p. 658.

State to show an exception to the warrant requirement. Krise v. State, 746 N.E.2d 957, 961 (Ind. 2001). However, the rights prohibiting illegal searches and seizures that are guaranteed by the Fourth Amendment and Article I, Section 11 of the Indiana Constitution are personal rights. Best v. State, 821 N.E.2d 419, 424 (Ind. Ct. App. 2005). In other words, in order to challenge the officers' presence under the Fourth Amendment, Davis must have had a legitimate expectation of privacy in the place that is searched. Id. at 424. And, to challenge the officers' presence under Article 1, Section 11, Davis "must establish ownership, control, possession, or interest in either the premises searched or the property seized." Id. at 425.

In this case, no evidence was presented establishing that Davis had ownership, control, possession, or interest in Jefferson's house or the items that were found inside. Indeed, no evidence was presented suggesting that Davis was an overnight guest or kept personal articles in the residence. In essence, Davis's status as an invited, temporary guest at Jefferson's residence afforded him no right to challenge the police officers' entry into the house. See Gregory v. State, 885 N.E.2d 697, 704 (Ind. Ct. App. 2008) (holding that a defendant who merely visited his mother's house did not have a legitimate expectation of privacy in her home or outlying barn for purposes of the Fourth Amendment). As a result, the trial court properly determined that Davis lacked standing to challenge the search of Jefferson's residence, and the items recovered during that search were properly admitted into evidence.

Davis also challenges the seizure and the police officers' operation of the key fob, the search of the vehicle, and the green bag in the trunk. With regard to Officer Ledoux's

second seizure of the key fob, we note that police officers may make a warrantless arrest when they have probable cause to believe that a person has committed a felony at any time or when they have probable cause to believe that a misdemeanor is committed in their presence. Crawford v. State, 755 N.E.2d 565, 567 (Ind. 2001). This court has determined that probable cause exists when the arresting officer has knowledge of facts and circumstances that would warrant a person of reasonable caution to believe that the suspect has committed a criminal act. Fentress v. State, 863 N.E.2d 420, 423 (Ind. Ct. App. 2007). However, probable cause is a fluid concept that is incapable of precise definition. Snover v. State, 837 N.E.2d 1042, 1048 (Ind. Ct. App. 2005). We also note that when an arrest occurs that is supported by probable cause, police officers may search the arrestee and the area within the arrestee's immediate control. White v. State, 772 N.E.2d 408, 411 (Ind. 2002).

Although nearly identical to the wording in the search and seizure clause of the federal constitution, Indiana's search and seizure clause[6] is independently interpreted and applied. As our Supreme Court has observed:

> To determine whether a search or seizure violates the Indiana Constitution, courts must evaluate the "reasonableness of the police conduct under the totality of the circumstances." Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005). "We believe that the totality of the circumstances requires consideration of both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the

[6] Article I, Section 11 provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issues, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

search or seizure." Id. at 360. In Litchfield, we summarized this evaluation as follows:

> In sum, although we recognize there may well be other relevant considerations under the circumstances, we have explained reasonableness of a search or seizure as turning on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizens' ordinary activities, and 3) the extent of law enforcement needs.

Myers v. State, 839 N.E.2d 1146, 1153 (Ind. 2005). The burden is on the State to show that under the totality of the circumstances, the intrusion was reasonable. Buckley v. State, 886 N.E.2d 10, 14 (Ind. Ct. App. 2008). And it is possible that the Indiana Constitution may prohibit searches that are not prohibited by the federal Constitution. State v. Moore, 796 N.E.2d 764, 767 (Ind. Ct. App. 2003).

As discussed above, when the police entered Jefferson's residence, they found Davis sitting with the others around a table in a room that smelled of burnt marijuana. Tr. p. 219, 220-22. Marijuana and a hand-rolled cigarette were found on the table. Id. at 22, 389. Officer McPherson smelled an odor from the kitchen that was produced by the process of cooking cocaine. Id. at 247. He also saw a crack-manufacturing operation in the kitchen that included a Pyrex bowl in a cooling bath that contained sixty-six grams of cocaine. Id. at 516.

Under the circumstances, it was reasonable to infer that the men were smoking marijuana and playing cards while in the process of manufacturing crack cocaine. As a result, the police officers had probable cause to arrest Davis and the others for possession of marijuana and/or cocaine. Therefore, the officers properly searched Davis and seized

the key fob incident to the arrest. Thus, because the key fob was lawfully seized, we cannot say that the officers exceeded their authority when they pressed the panic button to identify the parked vehicle. Indeed, our Supreme Court has determined that police officers may inspect, operate, and test evidence that has lawfully come into their possession. See Lee v. State, 849 N.E.2d 602, 606 (Ind. 2006) (holding that under the Fourth Amendment and the Indiana Constitution, police officers could view videotapes that had legally come into their possession without a warrant for the purpose of finding additional evidence of a criminal offense).

Finally, while Davis maintains that the search of the trunk and the bag inside was unlawful and the cocaine seized from the bag should have been excluded, we note that Indiana Code section 9-22-1-5 provides that when a police officer "discovers a vehicle in possession of a person other than the person who owns the vehicle and the person cannot establish the right to possession of the vehicle, the vehicle shall be taken to and stored in a suitable place." Moreover, the inventory exception to the warrant requirement permits the police to conduct a warrantless search of a lawfully impounded vehicle if the search is designed to produce an inventory of the vehicle's contents. Abran v. State, 825 N.E.2d 384, 390 (Ind. Ct. App. 2005). As we discussed in Davis's prior appeal:

> To determine the propriety of an inventory search, the threshold question is whether the impoundment itself was proper. [Abran, 825 N.E.2d at 390]. If the court determines that the impoundment is lawful, the court must then consider whether the "search itself [is] conducted pursuant to standard police procedure." Id. at 390-91.
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> Additionally, our Supreme Court has determined that an inventory search passes constitutional muster when it is reasonable under all the facts and circumstances of the case. Fair v. State, 627 N.E.2d 427, 431 (Ind.

> 1993). We evaluate both the propriety of the impoundment and the scope of the inventory for reasonableness. Id. To insure that the search is not a pretext "for general rummaging in order to discover incriminating evidence," the State must establish that the search was conducted pursuant to standard police procedures. Id. at 435 (quoting Florida v. Wells, 495 U.S. 1, 4 (1990)).

Slip op. at 7.

As discussed above, Davis was under arrest before the police officers searched the vehicle. Therefore, the vehicle was properly impounded. See Vehorn v. State, 717 N.E.2d 869, 875 (Ind. 1999) (holding that the police may properly impound a vehicle when the driver has been arrested). With regard to the subsequent inventory search, the evidence demonstrated that the Indianapolis Police Department has a specific policy with respect to vehicle impoundments and inventory searches. Ex. A. Officer McPherson testified that he searched the vehicle in accordance with that policy after Davis was arrested. Davis could not have taken the vehicle or his property because he was going to be transported to jail. Hence, when considering these circumstances, we conclude that it was reasonable for the police to impound the vehicle and search it pursuant to the inventory exception to the warrant requirement.

Finally, in analyzing the search of the vehicle in accordance with Article I, Section 11 of the Indiana Constitution as set forth in Litchfield, the degree of objective suspicion that was reasonably focused on Davis and the vehicle is undeniable. Thus, the factors leading to our conclusion that impounding and inventorying the vehicle was permissible under the Fourth Amendment likewise support the conclusion that the search did not violate the Indiana Constitution. Put another way, when considering all of the facts

known to the police officers at the moment of impoundment, it was reasonable to impound and inventory the vehicle. Thus, Davis's claim that his right to be free from unreasonable search and seizure under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution was violated fails.

II. Motion to Sever

Davis next argues that the trial court erred in refusing to grant his motion to sever the proceedings once Jefferson was permitted to proceed pro se. Specifically, Davis maintains that the denial of the motion to sever prejudiced him because he was "never given the opportunity to cross examine . . . Jefferson on whether at the time of the search all of those narcotics were his." Appellant's Br. p. 19.

In general, the decision regarding a request to sever a trial are reviewed for an abuse of discretion. Craig v. State, 730 N.E.2d 1262, 1265 (Ind. 2000). The trial court's ruling is afforded great deference on appeal, and we will reverse the trial court only when the decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. Agilera v. State, 862 N.E.2d 298, 302 (Ind. Ct. App. 2007), trans. denied.

In this case, Davis did not object, move for a mistrial, or renew his motion to sever the proceedings during Jefferson's testimony or after the trial court's admonishment to the jury. Thus, he cannot now be heard to complain. See Endres v. State Police, 809 N.E.2d 320, 322 (Ind. 2004) (holding that to preserve an issue on appeal, a party must, at a minimum show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal). Indeed, the trial court's

discretion in denying Davis's pretrial motion for severance should not be judged in hindsight. More specifically, when the trial court ruled on Davis's request to sever the proceedings, Jefferson had not made any improper interjections during the trial. Even more compelling, our Supreme Court has determined that an admonishment is presumed to cure errors in the solicitation of evidence or resulting form improper argument. Wright v. State, 690 N.E.2d 1098, 1111 (Ind. 1997).

Nonetheless, Davis maintains that "an error of this magnitude . . . constitutes fundamental error." Appellant's Br. p. 18. The fundamental error doctrine is narrow and applies when the error constitutes a blatant violation of basic principles. Mathews v. State, 849 N.E.2d 578, 587 (Ind. 2006). To constitute fundamental error, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. Brown v. State, 799 N.E.2d 1064, 1067 (Ind. 2003).

In this case, Davis makes no argument as to how Jefferson's statements—which essentially implicated himself and none of the co-defendants—were not cured by the trial court's admonishments. As discussed above, the trial court admonished the jury to disregard Jefferson's testimony with regard to various issues and to consider his statements as argument rather than evidence. Tr. p. 615, 619. Therefore, Davis's claim that the trial court's denial of his motion to sever amounted to fundamental error fails.

III. Instructions

Davis next contends that his conviction must be reversed because the trial court erred in refusing his tendered instruction. Moreover, Davis maintains that the jury verdict was unreliable because the jury could have convicted based upon less than a

unanimous decision in light of the inadequate final instructions that the trial court gave. Thus, Davis argues that "the court could have easily separated the [charging] information to be sure the jury all agreed on which drugs they found Mr. Davis possessed." Appellant's Br. p. 5-6.

In resolving this issue, we initially observe that instructing the jury lies within the sole discretion of the trial court, and a conviction will not be reversed due to the giving or refusal of an instruction unless considering the instructions as a whole and in reference to each other, the instructions mislead the jury as to the law in the case. Carter v. State, 766 N.E.2d 377, 382 (Ind. 2002). In determining whether the trial court abused its discretion, we must consider: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and (3) whether the substance of the instruction was covered by other instructions that were given. Lampkins v. State, 778 N.E.2d 1248, 1253 (Ind. 2002). However, even if an instruction is erroneously given or refused, a new trial is not warranted unless the defendant affirmatively demonstrates that the error has prejudiced his substantial rights. Hancock v. State, 737 N.E.2d 791, 794 (Ind. Ct. App. 2000).

In this case, Davis complains that the trial court erred in refusing to give the following instruction:

> The mere presence where cocaine is located or associations with persons who possess cocaine is not alone sufficient to support a finding of constructive possession.
>
> To prove constructive possession the State must prove beyond a reasonable doubt that:
> (1) the Defendant;

(2) had control over the automobile;
(3) knowledge of the cocaine's presence; and
(4) intent to transport the cocaine.

Appellant's App. p. 121.

In examining the above, we note that Davis's tendered instruction did not set forth the meaning of "association." Thus, the jurors were free to believe that they were obligated to acquit Davis of the charged offense if the evidence—including, for instance, the crack cocaine cooking in Jefferson's kitchen and the cocaine seized from the vehicle—proved an "association" between Davis and one or both of the co-defendants. Moreover, Davis's tendered instruction informed the jury that the State was required to prove that Davis had simultaneous "control over the automobile, knowledge of the cocaine's presence" and "intent to transport the cocaine." Appellant's App. p. 121. In other words, the instruction erroneously informed the jury that the State had to prove that Davis drove the automobile while knowing that cocaine was in the trunk. Proof that Davis drove the vehicle after he put the bag in the trunk is simply not required for a conviction. Moreover, Davis's tendered instruction regarding his "association" inside Jefferson's residence is similarly defective for suggesting that the State had to prove Davis's "control and dominion" over Jefferson's residence. Id. at 122. Therefore, Davis's tendered instruction did not correctly state the law and the trial court did not abuse its discretion when it refused to give it.

In a related argument, Davis asserts that he was exposed to a conviction on less than a unanimous verdict in light of the instructions that were given. More particularly, Davis points out that the State was permitted to file an amended charging information

that added two counts alleging that he was guilty of dealing in cocaine and/or that he was guilty of possessing cocaine. Therefore, Davis asserts that the case was improperly "submitted to the jury based on a combined information wherein possession could have been found based on what was in the kitchen, in the car, or on Mr. Jefferson's person." Appellant's Br. p. 20. Hence, Davis complains that part of the jury could have thought that he possessed drugs in the car while another group could have found that he constructively possessed drugs in the house. As a result, Davis asserts that the trial court should have instructed the jury that it should reach "a unanimous verdict on the same rationale of guilt." Id. at 21.

Notwithstanding Davis's contentions, the first two counts of the amended information, which were later dismissed, also alleged that Davis committed dealing and/or possession of cocaine, either alone or in conjunction with Jefferson and Chapman. Id. at 38, 97. The first two counts of the amended information are identical to the allegations set forth in the original information, which was used to instruct the jury, and Davis did not object to the language contained in the original charges. Thus, the trial court determined that Davis had waived the issue, and commented as follows:

> [I]ts too late. You've waived it by not objecting to the information and allowing the whole trial to proceed under one count that he possessed some cocaine with the intent to deliver. And the amount, whether it's three grams or not it's a lesser-included issue. Instead of raising the issue at the beginning where we could have maybe solved it by separate informations. Or specific information. It's just too late now.

Tr. p. 558.

This court has determined that a defendant may not "sit idly by" while an error is being committed and then take advantage of his silence on appeal. Guardian v. State, 743 N.E.2d 1251, 1255 (Ind. Ct. App. 2001). Hence, Davis is not permitted to remain silent and take advantage of his silence by demanding that the trial court change the jury's instructions after permitting the entire trial to proceed without any objection, and then complain on appeal that the verdict was unjust. Davis should have challenged the propriety of the charging informations at the pretrial stage of the proceedings.

Finally, even assuming for the sake of argument that an error occurred, it is harmless because the trial court instructed the jury that the verdict must be unanimous. Appellant's App. p. 108. Although Davis speculates that some of the jurors might have convicted him on one possession count but acquitted him of the other and, therefore, the unanimity of the verdict could not be relied upon, he never raised the issue at the trial court level prior to trial. Moreover, this was not an instance where the jury was compelled to unanimously choose only one of the transactions as the basis for the conviction. Rather, as is discussed below, sufficient evidence was presented to support the theories that Davis was guilty of constructive possession over the cocaine in the vehicle, Jefferson's kitchen, or both. And, even assuming that some of the jurors favored the vehicle, some favored the kitchen, and others favored both locations, it is apparent that the jury's verdict was unanimous as to guilt. See Taylor v. State, 840 N.E.2d 324, 333 (Ind. 2006) (observing that unanimity is not required as to the theory of the defendant's culpability). Therefore, Davis's claim fails.

IV. Sufficiency of the Evidence

Davis next argues that the evidence was insufficient to support his conviction for dealing in cocaine. Specifically, Davis maintains that there was no evidence "connecting . . . Davis to being in constructive possession of the drugs found in the kitchen or the car." Appellant's Br. p. 5.

When reviewing a challenge to the sufficiency of the evidence, this court considers only the probative evidence and reasonable inferences that support the verdict. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). It is the fact finder's role to determine whether the evidence is sufficient to support a conviction. Id. When we are confronted with conflicting evidence or interpretations of the evidence, we only consider the facts and inferences most favorably to the trial court's ruling. Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005). We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000).

We note that possession of contraband may be either actual or constructive. Gee v. State, 810 N.E.2d 338, 340 (Ind. 2004). Actual possession occurs when a person has direct physical control over the item. Id. To establish constructive possession, the State must show that the defendant had both the intent and the capability to maintain dominion and control over the contraband. Id. When possession of the premises is non-exclusive, the inference of intent to maintain dominion and control over the drugs must be supported by additional circumstances pointing to the defendant's knowledge of the nature of the controlled substances and their presence. The additional circumstances have been shown

by various means, including: (1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant. Id. at 341.

As discussed above, the police officers found Davis sitting with Jefferson and Chapman around a table in a room that smelled of burnt marijuana. Tr. p. 219, 220-22. Marijuana and a hand-rolled marijuana cigarette were on the table, and sixty-six grams of crack cocaine was being produced in the kitchen. Id. at 22, 247. Moreover, nearly 1.5 pounds of cocaine with a street value of $63,000 was found in a vehicle to which Davis had the key. Id. at 359, 517-18. The jury was entitled to weigh Davis's version of the events together with the fact that he held a key to the vehicle that held a substantial amount of cocaine and infer that Davis was in constructive possession of the cocaine and was guilty of dealing in that substance. Therefore, Davis's challenge to the sufficiency of the evidence fails.

V. Inappropriate Sentence

Finally, Davis claims that the forty-five-year sentence was inappropriate when considering the nature of the offense and his character. Specifically, Davis argues that

the enhanced sentence was excessive[7] because there were no drugs or weapons found on his person and he did not attempt to flee from the police.

Pursuant to Indiana Appellate Rule 7(B), our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." We defer to the trial court during appropriateness review, Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007), and we refrain from merely substituting our judgment for that of the trial court. Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that the sentence is inappropriate.

Regarding the nature of the offense, the evidence demonstrated that Davis was involved in a drug-manufacturing operation that involved $6000 worth of crack cocaine that was cooking in Jefferson's kitchen and nearly $63,000 in powdered cocaine in the trunk of the vehicle. Tr. p. 515-17. In furtherance of that enterprise, Davis used his girlfriend and her mother to obtain a rental car to transport the drugs. Id. at 410, 412-13. Davis possessed 702 grams of cocaine, which far exceeds the minimum amount

[7] When Davis was alleged to have committed the offense in 2004, Indiana Code section 35-50-2-4 provided that "[a] person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances." On April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, within an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7.

necessary to commit dealing in cocaine.[8] As a result, we do not find the nature of the offense to aid Davis's argument.

In examining Davis's character, the record shows that he has been placed under arrest, convicted, placed on probation, or serving a sentence during each year of his adult life with the exception of 2005, while he was awaiting trial in this case. Presentence Report at 3-5. On one occasion, Davis received a harsh sentence for drug dealing and, although that sentence was eventually modified, he continues to violate the law and has not been deterred from criminal conduct. In essence, Davis has demonstrated a pattern of involvement in the drug trade, and prior leniency and short sentences have been to no avail. Thus, after analyzing the nature of the offense and Davis's character, we do not find the forty-five year sentence inappropriate.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.

[8] Indiana Code section 35-48-4-1 requires the possession or manufacture of only three grams to support a conviction for dealing in cocaine.